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No. 95-813 (3)

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

BRAD BENNETT, ET AL.
Petitioners,

v.

MARVIN PLENERT, ET AL.
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, ALASKA, ARIZONA, COLORADO, KANSAS, MONTANA, SOUTH CAROLINA, TEXAS AND UTAH IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The "citizen suit" provision of the Endangered Species Act of 1973 ("ESA"), Section 11(g)(1), 16 U.S.C. section 1540(g)(1), authorizes "any person" to commence a civil suit on his own behalf to enjoin the United States from violating the ESA or regulations issued thereunder. The questions presented are:

1. Whether the broad standing mandated by Congress in the citizen suit provision of the ESA is subject to a "zone of interests" test as a further prudential limitation on ESA standing.

2. If the "zone of interests" test applies, whether ESA standing is limited exclusively to litigants asserting an interest in preserving endangered species, as the Ninth Circuit held, and does not include litigants whose economic interests have been adversely affected by the Government's violations of the ESA.

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INTEREST OF AMICI STATES

Amici States are vitally interested in the scope of standing under the citizen suit provision of the Endangered Species Act ("ESA"), Section 11(g)(1), 16 U.S.C. section 1540(g)(1). Because States are "persons" within the meaning of the ESA, see section 3(13), 16 U.S.C. section 1532(13), they are entitled to sue under the citizen suit provision. Consequently, the Ninth Circuit's narrow interpretation of citizen suit standing directly and adversely affects the States' ability to pursue judicial remedies for violations of the ESA and its regulations.

Amici States also have a strong interest in the implementation of the ESA provisions that were allegedly violated in this case, sections 4 and 7 of the ESA, 16 U.S.C. sections 1533, 1536. A great deal of land, resources, and productive economic activity within amici States is subject to regulation under sections 4 and 7 of the ESA. If litigants whose economic interests are harmed by the Government's violation of sections 4 and 7 lack standing to challenge those

ESA violations, then the economic well-being of States and their citizens will be diminished unlawfully without judicial recourse. Because so many endangered species are found within the geographic area of the Ninth Circuit, the decision below has a major impact on the overall administration of the ESA.

In sum, amici States have a strong interest in, and are directly affected by, the decision below. They respectfully submit this amicus brief in support of the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Nature of the Litigation and the Ninth Circuit's Decision

Petitioners are ranchers and irrigation districts which receive water from a U.S Bureau of Reclamation ("Bureau") water project, the Klamath Project, pursuant to contracts with the Bureau. See Appendix to Petition for Writ of Certiorari ("App.") 33-34, ¶5. As a result of a section 7 ESA consultation between the Bureau, as operator of the Klamath Project, and the U.S. Fish and Wildlife Service ("FWS"), water in two Klamath Project reservoirs that otherwise would have gone to petitioners was kept in the reservoirs, allegedly to avoid jeopardy to two endangered species of fish that live in the reservoirs. App. 37-40, ¶¶14-19, 21.

Petitioners filed suit against respondents, the Secretary of the Interior and FWS officials, pursuant to the citizen suit provision of the ESA[1/]. Their complaint alleged that

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1. Section 11(g)(1), 16 U.S.C. section 1540(g)(1) provides, in pertinent part:

"Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf --

(A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof" (Emphasis added)

respondents violated the ESA by:

(1) failing to use the "best scientific and commercial data available", as is required under section 7(a)(2) of the ESA,[2/] in formulating the Biological Opinion for the Klamath Project and concluding that project water was needed to avoid jeopardy to the endangered fish, App. 37-41, ¶¶13, 20, 25, 28; and,

(2) by issuing a Biological Opinion for the endangered fish which, by setting forth hydrologic requirements in the reservoirs where the endangered fish live, implicitly determined "critical habitat" for the fish under section 4 of the ESA without considering the economic impacts of that critical habitat designation, as is required under section 4(b)(2) of the ESA. App. 40-42, ¶¶22, 31.[3/]

The district court granted respondents' motion to dismiss for lack of standing, and the court of appeals affirmed.

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2. Section 7(a)(2), 16 U.S.C. section 1536(a)(2) provides in pertinent part:

"Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . to be critical, unless such agency has been granted an exemption for such action . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." (Emphasis added).

See also 50 C.F.R. section 402.14(g)(8) ("in formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the [FWS] will use the best scientific and commercial data available"). (Emphasis added).

3. Section 4(b)(2), 16 U.S.C. section 1533(b)(2) provides, in pertinent part:

"The Secretary shall designate critical habitat . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." (Emphasis added).

Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995) (App. 1-18).

In an opinion by Judge Reinhardt, the Ninth Circuit rejected petitioners' contention that the prudential "zone of interests" test had been rendered inapplicable by the broad grant of standing in the ESA citizen suit provision. App. 8. The court held that petitioners failed the "zone of interests" test because "only plaintiffs who allege an interest in the ***preservation*** of endangered species fall within the zone of interests protected by the ESA." App. 11. (Emphasis in original). The court thought that only species preservation interests satisfy the "zone" test because "[t]he overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the [petitioners'] challenge." App. 12-13. Because petitioners' wanted to use project water for irrigation and recreation, not species preservation, the court of appeals thought that petitioners were asserting a "competing interest" in the water that was "inconsistent with the [ESA's species preservation] purposes". App. 17. Finally, the court said that even though the ESA required the FWS to consider the economic impacts of designating critical habitat, Congress "did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Id.*

B. Impact of the Ninth Circuit's Decision on Administration of the ESA

The Ninth Circuit's decision essentially means that the only people who can sue under the citizen suit provision of the ESA to challenge a variety of ESA actions -- for example, listing species as threatened or endangered, designating land and resources as critical habitat, making section 7 jeopardy determinations, formulating reasonable and prudent alternatives and measures, etc. -- are litigants (most probably environmental organizations) who assert a species preservation

interest.[4] All other litigants who allege that the Government's violation of the ESA has harmed their economic, recreational, or any other interest besides species preservation (which includes almost all landowners and economic interests burdened by ESA regulation) have no citizen suit standing under the ESA.

This means that ESA enforcement in the Ninth Circuit is now completely one-sided. If one alleges that the Government has underregulated under the ESA because the Government failed to adequately protect endangered species, then one is asserting a species preservation interest, and one has standing. But if a litigant alleges that the Government overregulated based, for example, on the failure to use valid scientific data, or to consider economic impacts (as alleged in this case), then the interest being asserted is contrary to species preservation, and the courthouse door is closed for lack of standing.

This is a judicial prescription for regulatory failure. By removing legal checks on overregulation and permitting only suits alleging underregulation, the Ninth Circuit's one-sided standing rule will skew agency implementation of the ESA away from the type of implementation and decision-making that Congress intended.

It is inconceivable that Congress could have intended this result. In requiring the FWS to consider the economic impacts of designating critical habitat, who could Congress have intended to protect other than people like petitioners whose economic interests are adversely affected if economic impacts are not considered? The Ninth Circuit has essentially written out of the ESA the section 4(b)(2) duty to consider

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4. Some economic interests may assert a derivative interest in species preservation for economic reasons; for example, fishermen may seek to protect endangered salmon so they can fish for salmon when the species recovers. But the usual advocates of species preservation interests under the ESA are environmental organizations, not economic interests. The Ninth Circuit also left open the possibility that some other standing rule might apply to parties "directly subject to . . regulatory action", App. 6, n.2, without detailing how such "directly regulated" parties are identified.

economic impacts because the only parties who would enforce this ESA requirement are economic interests adversely affected by non-compliance with section 4(b)(2). Environmental organizations or persons championing a species protection objective are not about to complain about the failure to consider economic impacts in species-protective actions, like designation of critical habitat.

The economic impact requirement in section 4(b)(2) was added to the ESA in 1978 so that critical habitat would be designated more judiciously without paralyzing needed development projects. See 2 *A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980* ("*ESA Legis. Hist.*") Cong. Research Serv. (1982) at 813-814 (colloquy between Rep. Buchanan and Bevill). Moreover, the ESA and regulations thereunder provide for notice, opportunity for comment, and public hearings on the designation of critical habitat. See section 4(b)(5), 16 U.S.C. section 1533(b)(5); 50 C.F.R. section 424.16. The evident intent of these provisions was to allow persons adversely affected by critical habitat designations to participate in the designation process. See e.g., *ESA Legis. Hist.* at 1218 (Conf. Rept. 1804, 95th Cong., 2d Sess.) These public participation rights, as well as the substantive requirement to consider economic impacts in designating critical habitat are meaningless if persons like petitioners have no standing to sue to enforce section 4(b)(2).

Finally, in the wake of the Ninth Circuit's decision it is unclear if there is anything left of "procedural injury" or so-called "footnote 7" standing under *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). See 112 S.Ct. at 2142 n.7. Footnote 7 of *Lujan* indicates that litigants have standing to challenge procedural violations of the ESA provided they satisfy constitutional standing requirements and establish injury-in-fact to concrete interests. *Id.* However, because the Ninth Circuit superimposes its "zone of interests" test upon any "footnote 7" standing, see App. 5, n. 1, injury-in-fact to concrete economic or recreational interests (or any interest other than a species-preservation interest) disqualifies one from "footnote 7" standing.

The Ninth Circuit's decision drastically changes the landscape of ESA enforcement. The citizen suit provision is

now largely the exclusive domain of environmental plaintiffs, and ESA regulatory incentives are skewed in the direction of overregulation.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. This Court Should Resolve An Inter-Circuit Conflict That Affects Not Just Enforcement of the ESA, But Also The Interpretation of Citizen Suit Provisions in Numerous Other Statutes

Lujan v. Defenders of Wildlife, supra, 112 S.Ct. 2130, held that persons suing under the citizen suit provision of the ESA must satisfy constitutional requirements for standing. As *Lujan* explained, constitutional standing requirements must be superimposed upon any Congressional grant of standing to ensure that courts only decide Article III "cases" or "controversies", and avoid intruding on the separation of powers. *Id.*, 112 S.Ct. at 2143-2146.

This case presents the issue of prudential standing under the ESA which was left unresolved in *Lujan*. The issue here is: if a person suing under the citizen suit provision of the ESA satisfies constitutional standing requirements, can the courts nonetheless impose further prudential limitations on the broad standing mandated in the ESA citizen suit provision. Put another way, this case is the flip-side of the separation of powers issue in *Lujan*. If *Lujan* holds that Congress may not require the Courts to entertain anything less than an Article III "case" or "controversy", the issue here is whether the Ninth Circuit has intruded on Congress' prerogative to specify -- once constitutional Article III requirements are met -- those litigants who are authorized to enjoin violations of the ESA.

The courts of appeals have split on this important ESA prudential standing issue. The Eighth Circuit in *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds, Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) held that Congress' broad grant of standing in the citizen suit provision of the ESA left no room for further prudential limitations on standing, and that a litigant "need meet only the constitutional requirements for standing for . .

claims under the ESA." 851 F.2d at 1039. (Emphasis added).[5/]

In contrast, the Ninth Circuit here held that "the ESA does not automatically confer standing on every plaintiff who satisfies constitutional requirements", App. 11, and that "notwithstanding the broad language of the citizen-suit provision", prudential standing limitations applied to ESA standing. App. 8.[6/]

Whether and to what extent prudential standing limitations apply to citizen suit provisions is an issue that transcends the ESA. Citizen suit provisions are contained in numerous environmental, consumer, and civil rights provisions. See 13A Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d, §3531.13 at 69-73, ns. 8-10 (1984) (giving examples).[7/] Consequently, the split in the circuits over whether and when prudential limitations may be imposed

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5. Because this Court reversed in *Lujan* on grounds that environmental plaintiffs failed to satisfy constitutional standing requirements, there was no occasion to reach the Eighth Circuit's prudential standing ruling.

6. The District of Columbia Circuit also assumed, without much discussion, that the prudential "zone of interests" test applied to ESA standing when it upheld the standing of environmental plaintiffs. See *National Audubon Society v. Hester*, 801 F.2d 405, 407 n. 2 (D.C. Cir. 1986); *Humane Society of the United States v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988).

7. For example, almost every major environmental statute contains a citizen suit provision similar to that in this case. See Clean Water Act, 33 U.S.C. section 1365; Clean Air Act, 42 U.S.C. section 7604; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. section 9659; Toxic Substances Control Act, 15 U.S.C. section 2619; Surface Mining Control and Reclamation Act, 30 U.S.C. section 1270; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. section 1415(g); Safe Drinking Water Act, 42 U.S.C. section 300j-8; Noise Control Act of 1972, 42 U.S.C. section 4911; Energy Policy and Conservation Act, 42 U.S.C. section 6305, Outer Continental Shelf Lands Act, 43 U.S.C. section 1349, Solid Waste Disposal Act, 42 U.S.C. section 6972; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11046(a)(1).

upon ESA citizen suit standing has major implications for many of the Nation's laws.

The prudential standing issue in this case is cleanly presented because petitioners clearly satisfy constitutional standing requirements. Although the Ninth Circuit did not expressly so rule, it implied as much by stating: "The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test, the prudential standing limitation". App. 4-5. Since the case was disposed of on motion to dismiss, petitioners' burden of establishing constitutional standing at the pleading stage is a modest one. See *National Organization for Women v. Scheidler*, 114 S.Ct. 798, 803 (1994).

Petitioners clearly suffered "injury-in-fact" because water that otherwise would have gone to them under their contracts was reallocated to the endangered fish pursuant to the ESA. Indeed, the Ninth Circuit's characterization of petitioners' interests as being in direct conflict with the interests of the endangered fish, see App. 16, is essentially a restatement of the "injury-in-fact" that petitioners suffered as a result of the Section 7 consultation. The causation element of constitutional standing is satisfied because the alleged failure of federal officials to comply with the ESA resulted in the particular Biological Opinion and Section 7 consultation that brought about the reallocation of project water from petitioners to the fish. Finally, redressability is satisfied because setting aside the Biological Opinion and enjoining federal officials from failing to comply with sections 4 and 7 would restore petitioners to the priority for project water which they otherwise had under their contracts. Petitioners' economic injuries here are much more direct and immediate than the economic injuries that have afforded standing in other cases.[8/]

Consequently, the important issue of prudential

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8. Compare *Bryant v. Yellen*, 447 U.S. 352, 366-368 (1980); *Wyoming v. Oklahoma*, 112 S.Ct. 789, 797-798 (1992); *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2104-2105 (1995); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

standing under the ESA, which was unresolved in *Lujan*, upon which the circuits have divided, and which has major implications for citizen suit provisions in numerous other statutes, merits this Court's attention.

B. Even if A "Zone of Interests" Test Applies to ESA Standing, The Ninth Circuit So Misapplied That Test As To Necessitate Guidance From This Court On How Prudential Limitations May Be Applied In Citizen Suit Provisions

Assuming arguendo that a "zone of interests" test applies to citizen suit provisions, the applicability of the "zone" test in "non-APA" cases like this (i.e., where a regulatory statute other than the Administrative Procedure Act ("APA") expressly authorizes judicial review), is an area largely uncharted by this Court. *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987) is ambiguous as to whether and what extent a "zone" test, or something like it, may be appropriate in non-APA cases. See *Id.* at 400 n.16. Commentators have also noted the uncertainty on this score.[9/]

The Ninth Circuit essentially converted the "zone of interests" test into a "statutory purpose" test which uses an oversimplified definition of a statute's "purpose" to deny

9. See Tribe, *American Constitutional Law*, §3.19 at 143 (2d Ed. 1988) (noting that in the non-APA context, "the 'zone of interests' test is a doctrine of uneven application and uncertain meaning."); Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 Calif. L. Rev. 1061, 1077 (1988) (noting "nagging questions over applicability" of the "zone" test outside the APA context); Sealander, *Standing Behind Government-Subsidized Bipartisanship*, 60 Geo. Wash. L. Rev. 1580, 1592 (1992) ("confusion exists as to the applicability of the 'zone of interests' test outside of the APA context"); June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 Envtl. L. 761, 779-785 (1994). See also *Copper & Brass Fabricators v. Dept. of the Treasury*, 679 F.2d 951, 954 (D.C. Cir. 1982) (Ginsburg, J., concurring) ("The absence of a cogent explanation by the Supreme Court of the purpose, scope, or proper application of the 'zone of interests' test has bred confusion and divergent approaches among lower federal courts.")

standing to litigants whose claims purportedly conflict with this statutory purpose. Because the "zone" test threatens to evolve into something it was never intended to be, the Court should use this case to clarify the proper use of the "zone" test in non-APA cases.

Moreover, if the Ninth Circuit is right that economic injury is not within the ESA's "zone of interests", then this Court should not have reached the merits last term in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S.Ct. 2407 (1995). In *Sweet Home*, landowners and timber harvesting interests challenged the ESA's "harm" regulation alleging that the regulation "injured them economically." *Id.* at 2410. Consequently, the only basis for ESA standing in *Sweet Home* was economic injury like that of petitioners in this case.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN IMPOSING THE PRUDENTIAL "ZONE OF INTERESTS" TEST AS A FURTHER RESTRICTION UPON CITIZEN SUIT STANDING UNDER THE ESA

It is clear that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Applying this principle, the Court has held that the broad grant of standing in Section 812 of the Fair Housing Act of 1968 "extend[s] to the full limit of Art. III", *Gladstone, supra*, 441 U.S. at 103, n.9, and that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). See also *Trafficante v, Metropolitan Life Insur. Co.*, 409 U.S. 205, 209 (1972). More recently, in *Gollust v. Mendell*, 501 U.S. 115 (1991), the Court refused to engraft prudential limitations upon standing to sue for insider trading under Section 16(b) of the Securities Exchange Act of 1934, stating: "in light of the congressional policy of lenient standing, we will not read any

further condition into the statute, beyond the requirement that a §16(b) plaintiff maintain a financial interest in the outcome of the litigation sufficient to . . avoid constitutional standing difficulties." Lower courts have also held that broad statutory authorizations of suit eliminate prudential standing limitations.[10/]

The Ninth Circuit's imposition of prudential limitations on ESA standing was erroneous for at least three reasons. First, whether citizen suit provisions are subject to further prudential limitations is a question of congressional intent. See *Clarke, supra*, 479 U.S. at 400. Consequently, courts should use the traditional indicia of congressional intent, like the words of the statute authorizing judicial review, see *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 115 S.Ct. 1278, 1283-1284 (1995), the legislative history of the relevant laws, *Gladstone, supra*, 441 U.S. at 105-107, and the structure of the legislation, *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-348 (1984), 352 to answer the congressional intent question. Here, the Ninth Circuit failed to undertake any serious inquiry into congressional intent, and automatically assumed that the

10. See *Family and Children's Center v. School City*, 13 F.3d 1052, 1061 (7th Cir.), *cert. denied*, 115 S.Ct. 420 (1994) (Individuals With Disabilities Act provision authorizing suit by "any person aggrieved" meant that litigants "need not run the gauntlet of prudential standing tests; satisfying Art. III is enough"); *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107, 118-119 (D.C. Cir. 1990) (Energy Policy and Conservation Act ("EPCA") provision authorizing suit by "any person who may be adversely affected by any rule" eliminated prudential standing limitations); *Consumers Union v. Federal Trade Commission*, 691 F.2d 575, 576 (D.C. Cir. 1982) (en banc), *aff'd*, 463 U.S. 1216 (1983) (Federal Trade Commission Improvements Act provision authorizing "any interested party" to challenge the congressional veto provisions of the Act was "intended to permit standing . . to the full extent permitted by Article III."); *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 928-929 (D.Mont. 1992) (prudential standing limitations do not apply to ESA, and plaintiff suing under the citizen suit provision of the ESA "need only meet the constitutional requirements for standing in order to bring their claim under the ESA").

prudential "zone of interests" test applied to the ESA.

Because the "zone of interests" test was developed as a gloss on the phrase "aggrieved by agency action within the meaning of a relevant statute" in section 10 of the APA, *Clarke, supra*, 479 U.S. at 394-397, there is no reason why it should automatically apply to the altogether different language of the ESA which grants "any person" standing to enjoin violations of "any provision" of the ESA.[11/] *Clarke* emphasized that the "zone of interests" test "is not a test of universal application". 479 U.S. at 400, n. 16. The Ninth Circuit's transfer of the "zone" test from its original APA setting to a non-APA context, without any serious analysis of congressional intent, is contrary to this Court's exposition of the "zone" test, and wrongly intrudes on Congress' power to specify who it wants to enforce its statutes.

Second, there is no justiciability rationale for imposing prudential standing limitations in this case. Petitioners were not denied standing because they are unlikely to adequately present the disputed issues in a sharply focused adversarial context. Because petitioners' water rights were directly and adversely affected by the Section 7 consultation and FWS Biological Opinion, petitioners were in the best position to ensure the requisite adverseness. The Ninth Circuit's apparent belief that the Bureau of Reclamation, not petitioners, is a more appropriate plaintiff, see App. 6, actually selects the least appropriate party. It is unrealistic to think that the Bureau can sue the FWS, a fellow agency within the Department of Interior under the common control of the Secretary of the Interior, a named defendant in the action. This is hardly an alignment of parties guaranteeing adversity of interest and avoidance of collusion. Moreover, such a party alignment "would put the federal courts into the regular business of deciding intrabranch and intraagency policy disputes -- a role that would be most inappropriate." *Director, Office of Workers' Compensation Programs, supra*, 115 S.Ct. at

11. Given the plain meaning of "any person", the Ninth Circuit should have started with the presumption that Congress intended to abrogate prudential limitations on ESA citizen suit standing, and then proceeded to determine if there was any evidence of contrary intent.

1284-1285. (Emphasis added).

While prudential limitations may be justified in certain cases for judicial management reasons, like avoiding difficult problems of proof when distant purchasers have standing, and minimizing the opportunity for vexatious litigation, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-749 (1975), none of those considerations apply here.

Nor are prudential limits justified because petitioners are asserting the interests of third parties. See *Valley Forge College v. Americans United*, 454 U.S. 464, 474 (1982). Instead, petitioners are asserting that their water and contract rights -- rights personal to them -- have been adversely affected by the challenged regulatory action.

The distinction between plaintiffs who are and are not the "object" of the regulatory action at issue, see *Lujan, supra*, 112 S.Ct. 2137, is also no basis for imposing prudential limitations. The "object" of ESA regulation is the Klamath Project and its operations upon which ESA constraints were imposed. Because the Bureau is not an appropriate party to sue the FWS, petitioners, who derive their water from the Project, are the real "object" of the ESA regulation. Presumptively, they should have standing.

Alternatively, if the "object" of ESA regulation is taken to be the species itself,[12/] then all other parties, be they environmental or economic interests, have "derivative" standing. There is no reason, at least in terms of the "object" of regulation, why "derivative" environmental interests should have any greater standing than "derivative" economic interests.

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12. Outside of Justice Douglas's dissent in *Sierra Club v. Morton*, 405 U.S. 727 (1972), see *id.* at 741-742, and a few commentators, the notion that species should have standing has not been widely accepted. The Ninth Circuit, however, comes close in this case with its notion that the touchstone for standing should be whether the interests of a litigant conflict or are congruent with the interests of the species. See App. 16; See also *Pacific Northwest Generating Co-op v. Brown*, 38 F.3d 1058, 1063 (9th Cir. 1994) (in ESA case, describing district court's rationale that endangered salmon were "in effect, a ward of the court, or like a ward of the court, and concluding that all plaintiffs were disabled from representing the salmon by a conflict of their interests with the salmon's").

Finally, there is no separation of powers justification for prudential limitations in this case. Petitioners are not asserting a "generalized grievance", which is "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge College, supra*, 454 U.S. at 475; see also *Lujan, supra*, 112 S.Ct. at 2143-2146. Indeed, this case is the reverse of the "generalized grievance" situation. Here, the burdens of regulation are disproportionately concentrated upon persons like petitioners, and the environmental benefits of the regulation are broadly diffused. Yet, standing is accorded to diffuse beneficiaries who are free to allege claims of underregulation, but denied to those who bear the concentrated burdens of regulation and who seek to allege claims of overregulation. Standing is justified here both to protect minority interests that disproportionately bear regulatory burdens, see generally Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894-896 (1983), and to avoid dysfunctional incentives towards "overregulation."

In sum, the Ninth Circuit wrongly imposed prudential limitations on citizen suit standing without analyzing evidence of congressional intent, and without any justiciability or separation of powers justification for doing so. Instead, the Ninth Circuit substituted its own notion of what ESA policies should be advanced and by whom, thereby undermining Congress' prerogative to control standing as it sees fit through legislation.

II. IF A "ZONE OF INTERESTS" TEST APPLIES TO ESA STANDING, THE NINTH CIRCUIT NONETHELESS MISAPPLIED AND MISCONSTRUED THAT TEST

The Ninth Circuit misapplied the "zone of interests" test in several ways. First, the "zone" test accords standing to litigants whose interests are "arguably within the zone of interests to be protected or regulated by the statute . . in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added); see also *Clarke, supra*, 479 U.S. at 396. The Ninth Circuit ignored the "regulation" part of the "zone" test, and required that a

litigant's interest be "protected" by the relevant statute. This is contrary to the admonitions in *Clarke* that one need not show an "indication of congressional purpose to benefit the would-be plaintiff", *id.*, 479 U.S. at 399-400; that the "zone" test is "not meant to be especially demanding", *id.* at 399; and that to satisfy the test a litigant need only demonstrate a "plausible relationship" to the policies underlying the relevant statute. *Id.* at 403. (Emphasis added). Since the "zone" test is a gloss on section 10 of the APA which grants standing to persons "aggrieved by agency action", the "zone" test includes not just those benefitted by a statute, but the "aggrieved" who feel the bite of a regulatory program. Consequently, litigants, like petitioners here, who pay the costs of regulatory compliance fall within the zone of interests "regulated" by the statute. The "zone" test was never intended to be applied as narrowly as the Ninth Circuit applied it in this case.

Even if one construes the "zone" test to only include interests benefitted by, rather than burdened by, the ESA, petitioners are still clearly within the "zone." The substantive requirement to consider the economic impacts of critical habitat designation, and the right of the public to participate in the critical habitat designation rulemaking, can only have been intended to benefit people like petitioners. Who else could Congress have intended to benefit other than landowners and economic interests that bear the economic burdens of critical habitat designations? Therefore, petitioners satisfy even the most stringent "zone" test.

Second, the Ninth Circuit's notion that petitioners' interests are "inconsistent with the [ESA's] purposes", App. 17, cannot withstand scrutiny. The purpose of the ESA was not to protect species through arbitrary decision-making which lacks a valid scientific basis. Nor was the purpose of the ESA to designate critical habitat without considering economic impacts. Both of these requirements -- of using good science and considering economic impacts -- go to the heart and integrity of governmental decision-making (and species-protection efforts) under the ESA. Therefore, petitioners' allegations that these statutory provisions were violated is consistent with and furthers the purposes of the ESA, contrary to the Ninth Circuit's conclusion.

The fact that petitioners are in competition with the

endangered fish for water is not a basis for denying standing. Competitors of regulated industries or entities have interests contrary to those of the regulated party but have long had standing under the "zone of interests" test. See e.g., *Camp, supra*, 397 U.S. 150.

The Ninth Circuit's mistake was in using an oversimplified definition of the "purpose" of the ESA as a litmus test for standing. Interests, for purposes of the "zone" test, have to be defined and evaluated in relation to the particular statutory provisions and the relevant legislative intent behind them, not some judicial distillation of the (single) "purpose" of an act. "[I]t is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text." *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1594 (1994). Consequently, the touchstone for standing should not be a court's definition of a statute's "purpose", and whether certain litigants will or will not further that purpose.

Insofar as *Clarke, supra*, referred to certain interests as not being within the zone of interests if they are "so marginally related to or inconsistent with the purposes implicit in the statute", 479 U.S. at 399, the Court was simply saying that the impact on plaintiffs may not be so attenuated and indirect, (i.e., "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action", *id.*), and that the interests being asserted cannot be so far removed and remote from the concerns of the statute that "it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* That is not the case here. The adverse economic impacts on petitioners is direct and immediate. Moreover, when Congress crafted the requirements to use the best scientific data and to consider economic impacts in administering the ESA, it undoubtedly had in mind the interests of people like petitioners who bear the burdens of ESA regulation.

The ranchers and farmers who depend on Klamath Project water will do their part to fulfill the Nation's commitment to protect endangered species. But they should have access to the courts when the impositions upon them go beyond the law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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